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No. 87-40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLSTATE INSURANCE CO.,
Petitioner,

v.

JACK RANDY HAWKINS and CYNTHIA HAWKINS,
Respondents.

REPLY MEMORANDUM

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REPLY MEMORANDUM

The primary thrust of respondents' Brief in Opposition ("Br. in Opp.") is that the refusal of the court below to decide the federal questions tendered to it by petitioner deprives this Court of jurisdiction over this case because that refusal was based on what respondents characterize as a "consistently applied state practice," Br. in Opp., at 10, of declining to decide questions raised for the first time on appeal. Respondents make a related jurisdictional argument that petitioner "waived" its Excessive Fines Clause argument and certain of its Due Process Clause arguments and that there is "no urgent reason" for the Court to undertake review of these federal questions either because they are foreclosed by prior decisions of the Court or because the Court would benefit from further development of these questions by lower courts prior to their ultimate resolution.

Although respondents' arguments were, in the main, anticipated in the petition, respondents' mischaracterization of the pertinent practice of the court below regarding review of state and federal constitutional questions raised for the first time on appeal warrants a detailed reply. Certain other points raised by respondents will be treated summarily.

1. **Jurisdiction.** Respondents argue that the refusal of the court below to decide petitioner's federal questions constitutes an independent and adequate basis for depriving the Court of jurisdiction over this case. Respondents recognize that this argument depends entirely on whether the court below consistently refuses to entertain questions raised for the first time on appeal. Br. in Opp., at 12-14.[1]

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[1] None of respondents' arguments would preclude the Court's consideration of Question 4. As petitioner points out, Pet. Cert., at 20 n.7, the court below could not reinstate the jury's verdict and thereby deprive petitioner of its right to a new trial unless it first refused to

However, the decision in this very case demonstrates that the court below presently asserts absolute discretion to decide dispositive federal and state law questions irrespective of whether such questions have been timely raised in the lower Arizona courts or raised and briefed by the parties in the court below. Thus, reliance on the "consistent practice" of the court below is of no avail to respondents because their characterization of that practice, historical and current, is incorrect. Respondents' assertion, Br. in Opp., at 7, that petitioner "expressly waived" its Eighth Amendment challenge to the excessiveness of the $3,500,000 punitive damage award, is also demonstrably incorrect.

a. *The Practice of the Court Below.* Until the decision of this case, the court below routinely decided federal and state constitutional questions raised for the first time in that court if the questions were of "general statewide significance." Pet. Cert., at 15-18. Although respondents label petitioner's reliance on this historic practice "completely unfounded," Br. in Opp., at 14, they do not draw to the Court's attention so much as a single case in which the court below has ever departed from this practice. Nor do respondents seriously dispute that all of petitioner's federal questions qualified as ones of "general statewide significance."[2] The court below left no doubt that it had

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apply to this case its decision in *Linthicum* v. *Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986). Thus, Question 4 did not arise until after the decision of the court below. It was presented to the court below at the first opportunity, in petitioner's Motion for Reconsideration. Pet. Cert., at 14-15; Pet. Cert., App. 55a-58a. This presentation was manifestly more than adequate under decisions such as *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85-86 n.9 (1980) (federal questions arising from decision of highest state court need not be presented to that court prior to seeking review in this Court).

[2] Respondents suggest, Br. in Opp., at 13 n.8, that Question 3 regarding the requirement of proof by "clear and convincing" evidence was not an issue of statewide importance because by the time the court below ruled in this case, it had adopted petitioner's argument as a matter of state law in *Linthicum*. But, as petitioner points out, Pet.

"the power to consider the constitutional issues raised by Allstate." Pet. Cert., App. 23a, 733 P.2d, at 1086.

Instead, respondents attempt to distinguish the cases in which the court below has, *without departure*, followed this practice. Those cases are, however, indistinguishable,[3] and,

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Cert., at 9, 13, that the court below chose to use *Linthicum* rather than *Hawkins* as the vehicle for resolving this question does not negate the fact that this question, whether presented as one of state or federal law, was one of "general statewide significance."

[3] Respondents' characterization of the practice of the court below prior to the decision of this case, Br. in Opp., at 14 & n.10, is sheer sophistry. They assert, for example, that the "exception" carved out by the court below to its general rule precluding consideration of issues raised initially on appeal is applicable only where "*the issue was raised by the party in a timely manner.*" Br. in Opp., at 14 (emphasis in original). The court below, however, has never engrafted onto this exception some sort of secondary "timeliness" requirement as suggested by respondents. Respondents understandably decline to address directly the relevance of the decision in *Linthicum*, *supra*, in which the court below raised *sua sponte* and decided an issue of statewide significance. Rather, respondents suggest that *Linthicum* and *Barrio* v. *San Manuel Division Hospital for Magma Copper Co.*, 143 Ariz. 101, 692 P.2d 280 (1984), are somehow irrelevant to establish the practice of the court below because the court itself, rather than the parties, raised for the first time the question ultimately decided. Those two very recent cases, however, illustrate the extent to which the court below has reached out to decide questions of "general statewide significance." Nothing in this Court's decision in *Barr* v. *City of Columbia*, 378 U.S. 146 (1964), suggests that a state court may avoid the *Barr* rule by deciding federal questions only it, rather than the parties, raises for the first time.

Respondents' suggestion, Br. in Opp., at 14 n.10, that the other cases relied upon by petitioner are distinguishable because the new arguments were raised at the "outset" of appeals to the court below puts a totally unsupported gloss on the court's exception. Under that gloss, questions of statewide significance may be raised for the first time on appeal, but only up to some unspecified point in the appellate process. Respondents do not support this unusual suggestion by citation to any decision of the court below. Respondents continually inject phraseology such as "after oral argument" in an apparent attempt to sug-

as importantly, the court below did not attempt to distinguish them when it refused to decide petitioner's federal questions. Rather, the court below, clearly recognizing the relevance of its historical practice, announced a new practice under which it would, in this case and henceforth, exercise absolute discretion to hear, or refuse to hear, questions raised for the first time on appeal. The historical practice of the court below is, standing alone, sufficient to establish the Court's power to decide petitioner's federal questions.[4]

Finally, and as respondents implicitly concede, Br. in Opp., at 13, the retention by the court below of absolute discretion to decline to hear an issue which it has the power to hear under its rules cannot strip this Court of

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gest that petitioner's presentation of its federal questions in its Supplemental Briefs is somehow different from presentation of a question by an appellant "before" oral argument. This is a red herring. On May 16, 1986 petitioner sought, and was subsequently granted leave, to brief these federal questions. The only oral argument ever held in this case in the court below occurred on May 1, 1986, and that oral argument went only to the question whether the court should grant review of this case. Petitioner's and respondents' supplemental briefs were filed as ordered by the court below and were before that court for more than seven months while this case was under consideration in that court.

[4] Respondents' repeated assertions, Br. in Opp., at 9, 14, that the jurisdictional posture of this case is identical to that of *Judy's Foods, Inc.* v. *A&B Food Services Corp.*, 798 F.2d 468 (6th Cir.), *cert. denied*, 107 S. Ct. 460 (1986), are meritless. As the Court was well aware in denying certiorari in that case, the Eighth Amendment question had been raised in the Sixth Circuit in a supplemental brief filed on the same day that that court summarily affirmed the judgment of the District Court. Here, petitioner briefed, with the court's permission, its federal questions more than seven months prior to the court's decision. Furthermore, petitioner in *Judy's Foods* did not indicate in this Court that it had filed a motion with the Sixth Circuit for leave to file that supplemental brief. The filing and grant of such a motion were required in order to bring petitioner's Eighth Amendment argument before that court because such a brief is not otherwise authorized to be filed by the Federal Rules of Appellate Procedure.

its jurisdiction over substantial federal questions under cases such as *Barr* v. *City of Columbia*, 378 U.S. 146 (1964), and *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969).[5] In *Gosewisch* v. *American Honda Motor Co.*, ___ Ariz. ___, 737 P.2d 376 (1987), the court below once again exercised its newly announced, unfettered discretion to decide a point of state constitutional law raised for the first time on appeal. Applying its new rule in the context of an attack on the constitutionality of a jury instruction, the court decided this time to accept review:

> At trial, the only objection raised by Gosewisch to Honda's request was an alleged lack of evidentiary support. On appeal, Gosewisch asserts that the giving of an instruction pursuant to A.R.S. 12-683(3) violates article 18, section 5 of the Arizona Constitution.
>
> Honda argues that Gosewisch failed to timely object to the constitutionality of the jury instruction at issue. However, constitutional arguments are not necessarily waived by lack of objection in the trial court. *Questions of constitutional guarantees and violations thereof may be raised for the first time on appeal. Hawkins v. Allstate*

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[5] *Barr* requires that opposing litigants in the same case be treated evenhandedly. Yet, as petitioner documents, Pet. Cert., at 11, the jury's verdict in this case was reinstated only after the court below decided a question -- the excessiveness of the punitive damage award as a matter of state law -- that had not been presented by respondents in their Petition for Review. Respondents' only response to this point is their suggestion, Br. in Opp., at 20-21, that Question 3 as presented in their Petition for Review comprehended the question of the excessiveness of the award. Neither the language quoted by respondents nor any other pertinent language in their Petition for Review, however, bears out that suggestion. *See* Pet. Cert., App. 67a, 71a-72a. This discrimination against presentation of a federal question cannot be justified even under respondents' own professed understanding of the Court's decision in *Sullivan*. *See* Br. in Opp., at 13 n.9.

> *Ins. Co., Inc.*, 152 Ariz. 490, 493, 733 P.2d 1073, 1086 (Ariz. 1987) (consideration of constitutional issue raised for the first time on appeal is discretionary). We exercise our discretion to consider the constitutional issue presented by the petition for review.

737 P.2d, at 382 (emphasis added). The decision in *Gosewisch* confirms the existence of a rule of absolute discretion in Arizona which does not pass muster under *Barr* and *Sullivan*. *Gosewisch* also squarely refutes respondents' assertion, Br. in Opp., at 15-17, that petitioner "waived" certain of its Due Process Clause arguments because it did not interpose those arguments against the instructions given to the jury.

b. *Petitioner Did Not "Waive" Its Eighth Amendment Claim.* Respondents assert, Br. in Opp., at 7, that "petitioner deliberately chose not to raise its Eighth Amendment challenge at *any* stage below." (Emphasis in original.) This assertion is refuted by petitioner's argument to the court below that the reinstatement of the jury's verdict violated its rights under "the Due Process Clause of the Fourteenth Amendment and all other rights incorporated by that Clause, including the Excessive Fines Clause of the Eighth Amendment."[6] Motion for Reconsideration, *reprinted in* Pet. Cert., App. 53a.[7]

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[6] Respondents' "waiver" argument is especially curious in light of the fact that in their "Response to [petitioner's] Motion for Reconsideration," at 1, they took the position that petitioner's Motion for Reconsideration "is essentially a rehash of its arguments in its Supplemental Brief." Ten copies of that document have been lodged with the Clerk simultaneously with the filing of this Reply Memorandum.

[7] Respondents' "waiver" theory is based on their quotation, Br. in Opp., at 11, of part of a single sentence from petitioner's Supplemental Brief filed in the court below in which petitioner stated that it was relying on "the third-noted constitutional claim in *Lavoie* -- the due process argument." However, the Eighth Amendment, if applicable,

Furthermore, a majority of the Court has indicated that a litigant can never be viewed as having waived a "known right" prior to the Court's recognition of that right. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 145 (1967) (plurality opinion of Harlan, J.); at 172 n.1 (Brennan, J., concurring, joined by White, J.). The decision in *Curtis* not only requires rejection of respondents' "waiver" argument but, as discussed in part 1.c. below, also establishes petitioner's entitlement to the benefit of any decision of the Court recognizing the applicability of the Eighth Amendment to punitive damage awards.

Finally, the record as a whole clearly demonstrates that petitioner and respondents briefed the substance of the question whether the Eighth Amendment applies to punitive damage awards in civil cases.[8] The question of the excessiveness of the $3,500,000 award was decided by the court below as a matter of state law by its application of the same general test as would be required by the Eighth Amendment. Respondents concede this point: an award must be "proportional to the gravity of petitioner's of-

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would be applied through the Due Process Clause of the Fourteenth Amendment and was therefore subsumed within the Due Process Clause argument. This point is confirmed by petitioner's Motion for Leave to File Supplemental Briefs and for Additional Oral Argument, at 5, in which the pertinent language in *Lavoie* is quoted with special emphasis placed by petitioner on the Excessive Fines Clause question as well as the Due Process Clause question. Ten copies of that document have been filed with the Clerk simultaneously with the filing of this Reply Memorandum.

[8] In its Supplemental Brief, petitioner briefed what it characterized as "the threshold question . . . whether punitive damages are, in essence, a criminal penalty." Supp. Br., at 37-39. Petitioner also expressly pointed out the gross disparity between punitive damage awards rendered in Arizona and the maximum monetary penalty for conviction of a felony in Arizona -- $150,000. Supp. Br., at 42. Respondents argued to the contrary in their Supplemental Brief, at 32-40, to which petitioner responded in its Supplemental Reply Brief, at 10. Ten copies of each of these briefs have been lodged with the Clerk simultaneously with the filing of this Reply Memorandum.

fense" and it must not "deprive[] petitioner of its means of livelihood." Br. in Opp., at 19. Indeed, respondents maintain that "[b]ecause the Arizona Supreme Court applied this test as a matter of common law, . . . acceptance of petitioner's [Eighth Amendment] argument would not dictate a different result in this case." *Id.* While petitioner disagrees with respondents' legal conclusion, there is no doubt that this question was aired below and that it is fit for resolution by the Court in this case. *See, e.g., New York ex rel. Byrant* v. *Zimmerman*, 278 U.S. 63, 67 (1928) ("if the record as a whole shows . . . by clear intendment [that the federal question was presented], the claim is to be regarded as having been adequately presented."); *Eddings* v. *Oklahoma*, 455 U.S. 104, 114 n.9 (1982) (the Court's jurisdiction "does not depend on citation to book and verse.")

c. *Petitioner Is Entitled to the Benefit of Any Decision of this Court Applying the Eighth Amendment to Punitive Damage Awards.* Relying on their "waiver" theory, respondents, Br. in Opp., at 29 n.26, do not expressly disagree that petitioner would, absent a "waiver," be entitled to the benefit of any decision of the Court holding the Eighth Amendment applicable to punitive damage awards. Petitioner's entitlement to the benefit of a favorable ruling on the Eighth Amendment question is firmly grounded in cases such as *Curtis, supra,* in which a majority of the Court held that the failure of counsel to anticipate a major constitutional decision "cannot prevent a litigant from later invoking such a ground." 388 U.S., at 143 (plurality opinion of Harlan, J.); at 172 n.1 (Brennan, J., concurring, joined by White, J.). In this case, counsel for petitioner recognized and brought to the attention of the court below the potential significance of the pertinent portion of this Court's decision in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (Apr. 22, 1986), 106 S.Ct. 1580 (1986), less than four weeks after *Lavoie* was handed down and more than nine months before this case

was decided. Petitioner brought the Court's notation of probable jurisdiction in *Bankers Life* to the attention of the court below in its Motion for Reconsideration only eleven days after the Court had taken that action. *Bankers Life and Casualty Co.* v. *Crenshaw*, No. 85-1765 (prob. juris. noted Mar. 9, 1987). As the Court made clear in *Butts*, its rules regarding proper presentation of federal questions in the lower courts requires no more.

2. **The Urgent Need for Resolution of the Questions Presented.** Respondents argue, apparently in the alternative, that there is "no urgent reason" for the Court's decision of the questions presented by this case because, on the one hand, some have already been decided against petitioner's position by various lower courts, Br. in Opp., at 18, 21-22 & n.16, and because, on the other, some have not been addressed at all by lower courts and should be developed more fully in those courts, *id.*, at 28. However, the need for the Court's speedy resolution of these questions was recognized by this Court in *Aetna Life Insurance Co.* v. *Lavoie*, *supra*. The proposition underlying all four of the questions presented herein is that governmentally sponsored and enforced systems for imposing large monetary fines -- punitive damages -- for the purposes of punishment and deterrence are subject to the constraints of the federal constitution which have historically been applied to other forms of governmentally sponsored and administered punishments imposed after criminal and, in some instances, civil, proceedings. If this Court would ultimately sustain this proposition, then punishment is currently being imposed on a daily basis and a massive scale throughout the United States in an unconstitutional manner. Such widespread disregard for fundamental constitutional rights would surely be intolerable.

Finally, if as respondent argues, Br. in Opp., at 18, the central proposition underlying petitioner's questions "is directly contrary to this Court's prior decisions," then there is "little point in requiring a litigant [such as petitioner]

to request a state court to overrule or modify one of this Court's precedents." *Illinois* v. *Gates*, 462 U.S. 213, 251 (1983) (White, J. concurring).

CONCLUSION

Respondents' arguments cannot eclipse the overriding fact that petitioner raised federal constitutional questions characterized by this Court as "important" promptly after learning of this Court's pronouncement. They were raised in briefs filed with the explicit, advance permission of the court below. That court had over seven months fully and thoroughly to consider the arguments of petitioner and respondents and the power under its rules to do so. That the court below declined to consider these important issues cannot deprive petitioner of the right to present them here or the power of this Court to decide them in this case.

September 9, 1987

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